LSU Journal of Energy Law and Resources

Volume 8
Issue 1 *Fall 2019*

3-4-2020

Solar Panels in Condominium Communities

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INTRODUCTION

Experts predict that residential solar installations will continue to grow in 2019 ahead of the federal tax credit for rooftop solar panel installation starting to significantly decrease in 2020.[1] Not all these homeowners are in single-family residential communities. Rather, many owners of townhome-style or apartment-style condominiums want to install solar panels to power their homes. However, condominium associations can create roadblocks to solar installations through the Covenants, Conditions, and Restrictions (CC&Rs) imposed on homeowners. For example, some condominium associations have required excessive deposits for installations, denied homeowner applications for installations, or imposed inappropriate construction limitations.[2] In 2017, the California legislature passed A.B. 634 which severely limits the ability of condominium associations to preclude owners from installing solar panels in their separate interests.[3] The law became effective in January 2018.

The California Solar Rights Act, as amended by A.B. 634, provides a model for other states who want to encourage development of residential

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1. 26 U.S.C. § 48(a)(6)(A) (providing that credit diminishes from 30% of installation cost to 26% of installation cost); Nichola Groom, *U.S. Solar Installations to Rebound in 2019 as Prices Plummet*, REUTERS (Mar. 12, 2019, 11:05 PM), https://www.reuters.com/article/us-usa-solar-report/u-s-solar-installations-to-rebound-in-2019-as-prices-plummet-woodmac-idUSKBN1QU0BV [https://perma.cc/47XP-6QA9]. *See also*, Dara Bortman, *Next Year Will be Busy for Solar*, EXACTSOLAR (Oct. 5, 2018), http://exactsolar.com/next-year-will-be-busy-for-solar/ [https://perma.cc/S6EW-ZHHX] (predicting an increase in demand for solar installation ahead of the tax credit decrease). For perspective, a 30% tax credit on a $20,000 solar installation project would be $6,000, but a 26% tax credit on a $20,000 solar installation project would be $5,200. *But see* Air Natter, *Democrats Try to Extend Wind, Solar Aid They Agreed to Let Die,* BLOOMBERG (May 15, 2019, 12:24 PM), https://www.bloomberg.com/news/articles/2019-05-15/democrats-try-to-extend-wind-solar-aid-they-agreed-to-let-die [https://perma.cc/3HBJ-4K5Z] (discussing possibility for extension of credits to later years).

2. *See, e.g.*, Louis Hanson, *Solar Panels Getting Cool Reception from Homeowners Associations*, MERCURY NEWS (Oct. 11, 2015, 10:14 AM), https://www.mercurynews.com/2015/10/11/solar-panels-getting-cool-reception-from-homeowners-associations/ [https://perma.cc/U8AQ-6X3R] (discussing examples such as (1) an HOA in Orange County requesting a $5,000 application review deposit; (2) an HOA in Sacramento requesting homeowner to screen the array with a fence and subsequently denying the application; or (3) another Sacramento HOA rejecting solar array requests due to "aesthetic concerns").

3. Cal. Assemb. B. 634 (2017) (codified at CAL. CIV. CODE § 714.1 (2019)).

rooftop solar panels to meet renewable energy goals. While this law may not eliminate conflicts in every instance between condominium associations and homeowners seeking to install solar panels, it should be very effective in preventing associations from imposing unreasonable conditions that prevent installation or raise costs. Because the law regarding an association's ability to limit homeowners' ability to install solar panels is written in such clear terms, litigation has not yet resulted. Foreseeable challenges from condominium associations include attempting to impose onerous conditions on condominium owners or direct constitutional attacks, such as through the Contracts Clause. However, the law provides resolutions to prevent onerous conditions and can likely survive Contracts Clause challenges.

Part I of this Article will explore the development of the California Solar Rights Act. Part II.A will discuss common restrictions that condominium associations use to restrict installation of solar panels. Part II.B will analyze how the latest amendments to California's Solar Rights Act prevent these restrictions, tipping the scales in favor of the individual homeowner's rights to install solar panels. Part II.C demonstrates that the legislation meets constitutional standards because it furthers a legitimate state interest and the impairment of CC&Rs is reasonable.[4] Part II.D will compare the Solar Rights Act to a sampling of neighboring state laws. Finally, Part II.E will discuss best practices for homeowners and HOAs to avoid litigation risk.

I. BACKGROUND

The technology to produce power from photovoltaic solar panels has existed since the 19th century.[5] However, it has only been feasible as a power source since the 1950s, and during that time, it was used extensively for powering satellites and vessels for space exploration.[6] The major

4. *See* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 416 (1983) (providing the test for whether a law that impairs prior contractual obligations (such as CC&Rs within HOA communities) violates the Contracts Clause of the Constitution).

5. *See* U.S. DEP'T OF ENERGY, THE HISTORY OF SOLAR, https://www1.eere.energy.gov/solar/pdfs/solar_timeline.pdf [https://perma.cc/5ACA-XU34] (last visited Sept. 16, 2019); *History of Solar Energy in California*, GO SOLAR CAL., https://www.gosolarcalifornia.org/about/gosolar/california.php [https://perma.cc/8G22-H3HL] (last visited Sept. 16, 2019).

6. Alyssa Baker, *A History of Solar Cells: How Technology Has Evolved*, SOLAR POWER AUTHORITY, https://www.solarpowerauthority.com/a-history-of-solar-cells/ [https://perma.cc/P5HJ-4WSG] (last visited Sept. 16, 2019).

breakthrough was the discovery of silicon as a conductive material in 1954, which was exponentially more efficient than the earlier experiments with selenium.[7] These early solar panels were only able to convert about 4% of the sun's energy to electricity (this is known as the panels' efficiency).[8] The first commercially-available panels were extremely expensive, and the cost of generating one watt of electricity would cost over $17,000 in today's dollars.[9] However, further development in solar technology occurred, and increased efficiency of panels resulted in prices dropping dramatically in the 1970s.[10] Today, commercially-available panels for rooftop installation can achieve up to 22% efficiency, with the cost per watt at just over $3.[11] This has made solar panel technology much more affordable for the average homeowner.

California is a leader in energy efficiency innovation and has been at the forefront of encouraging residential solar energy installation.[12] California has codified a strict standard for renewable energy sources to supply 50% of power demand by 2030.[13] A large part of the renewable energy demand will be supplied by solar energy.[14] Starting in 2020, most new housing stock built in California will be required to be constructed

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7. THE HISTORY OF SOLAR, *supra* note 5.

8. *Id*.

9. *History of Solar Energy in California*, *supra* note 5 (providing that one $25 solar panel produces 14 milliwatts of electricity, for a price in 1955 dollars of $1785 per watt of generation capacity).

10. Baker, *supra* note 6 (noting that prices decreased from around $100 per watt of generation capacity to $40 per watt, in 1970s dollars).

11. *SunPower Solar Panels: The Complete Review*, ENERGYSAGE, https://news.energysage.com/sunpower-solar-panels-complete-review/ [https://perma.cc/9MJC-26D2] (last visited Sept. 16, 2019) (discussing how SunPower's solar panels can achieve up to 22% efficiency); *Comparing Top Solar Panel Brands: SunPower vs LG, SolarWorld, Panasonic, and Canadian Solar*, ENERGYSAGE, https://news.energysage.com/comparing-top-solar-manufacturers-sunpower-vs-lg-panasonic-solarworld-suniva/ [https://perma.cc/G6LA-TTRD] (last visited Sept. 16, 2019) (comparing leading brands in terms of efficiency, where average efficiency is just under 20%, and cost per watt). Efficiency is the amount of sunlight energy that the solar panel equipment converts to electricity.

12. WESTON BERG ET AL., THE 2018 STATE ENERGY EFFICIENCY SCORECARD vii, xi (2018), https://aceee.org/sites/default/files/publications/researchreports/u1808.pdf [https://perma.cc/Q56Y-XVPM].

13. *See* CAL. PUB. UTIL. CODE § 399.11(a) (2019).

14. CAL. ENERGY COMM'N, CALIFORNIA'S 2030 CLIMATE COMMITMENT 1, https://www.arb.ca.gov/html/fact_sheets/2030_renewables.pdf [https://perma.cc/TJ49-C8PK] (last visited Sept. 16, 2019).

with rooftop solar panels.[15] The California Solar Rights Act, which has been evolving since 1978, provides homeowners with assurance that their neighbors cannot interfere with their production of solar energy.[16] Additionally, the Solar Rights Act provides for a solar easement to ensure that a homeowner will receive sufficient light on their property to ensure solar panels have proper insolation to function.[17] Furthermore, the Solar Rights Act creates a cause of action for a solar panel owner to require a neighbor to trim vegetation to permit sufficient light for the solar panels.[18]

Several financial incentives, both at the state and federal level, have been developed to encourage homeowners to install rooftop solar energy systems. While state incentives used to be more widely available, California currently provides a property tax exemption whereby installing a solar energy system will not trigger a tax increase.[19] One important incentive comes from utility companies. Utility companies provide solar customers with a net metering program, where the homeowner's utility company provides bill credits to the customer for generating excess energy and sending it back to the grid.[20] This was made possible by the development of "smart meters," which can capture two-way energy transfers.[21] There are also tax incentives for installation of rooftop solar panels as well. At the federal level, significant tax credits are currently available through the 2022 calendar year.[22] For solar installations through the end of 2019, a homeowner may receive a tax credit of 30% of

15. CAL. CODE REGS. tit. 24, § 6-150.1(c)(14) (2018), https://www.energy.ca.gov/2018publications/CEC-400-2018-020/CEC-400-2018-020-CMF.pdf [https://perma.cc/GX9Q-ZDEK].

16. *See* SCOTT ANDERS ET AL., UNIV. OF SAN DIEGO LAW SCH., CALIFORNIA'S SOLAR RIGHTS ACT 2–3 (2014).

17. CAL. PUB. RES. CODE § 25982 (West 2019).

18. CAL. PUB. RES. CODE § 25983 (West 2019).

19. CAL. REV. & TAX. CODE § 73 (West 2019). *See also*, DESIGN EVEREST, A GUIDE TO SOLAR REBATES, INCENTIVES, AND TAX CREDITS IN CALIFORNIA (Sept. 10, 2019), https://designeverest.com/blog/guide-solar-rebates-incentives-and-tax-credits-california/.

20. CARL PECHMAN, MODERNIZING THE ELECTRIC DISTRIBUTION UTILITY TO SUPPORT THE CLEAN ENERGY ECONOMY 35 (2016), https://www.energy.gov/sites/prod/files/2017/01/f34/Modernizing%20the%20Electric%20Distribution%20Utility%20to%20Support%20the%20Clean%20Energy%20Economy_0.pdf [https://perma.cc/7QLP-RKCM].

21. Emma Rodvein, *Smart Meters: What Every Homeowner Should Know*, SOLAR UNITED NEIGHBORS (Sept. 13, 2018), https://www.solarunitedneighbors.org/news/smart-meters-what-every-solar-homeowner-should-know/ [https://perma.cc/8W92-6QFS].

22. 26 U.S.C. § 48(a)(6)(A) (2019).

equipment and installation costs.[23] For solar installations in 2020, a homeowner may receive a tax credit of 26%.[24] For solar installations in 2021, a homeowner may receive a tax credit of 22%.[25] After 2021, the tax incentive drops dramatically to 10%.[26]

One obstacle to the proliferation of solar energy self-generation has been restrictive covenants in neighborhoods governed by homeowners' associations, or HOAs. In 1979, a California trial court struck down CC&Rs that prevented solar system installations, finding that they were contrary to California public policy "to promote and encourage the use of solar energy systems and to remove obstacles" to do so.[27] However, some HOAs have proven to be resistant towards rooftop solar installations in their communities. In 2014, the California legislature attempted to alleviate this through amending the Solar Rights Act to provide limitations on the ability of HOAs to restrict solar installation.[28] In 2017, the California legislature again amended the statute to provide rules specific to condominium associations to make solar installation in condominium communities easier.[29] The provisions of these amendments are discussed in Part II.B, below.

Condominium associations are a subset of HOAs, and they carry their own nuances. In a single-family residential HOA community, the homeowner owns their lot and the house on the lot. There may be shared amenities, such as streets, parks, or fitness facilities that are owned in common with the other owners in the neighborhood.[30] Condominiums tend to be attached dwellings, either in the form of a townhouse or an apartment-style unit. The condominium owner owns the interior of their unit and perhaps a parking space and a small outdoor area, which is known

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23. *Id*. The credit is a refundable credit, so if the taxpayer cannot utilize the entire credit against current year tax liability, it can be carried forward to future years. INTERNAL REVENUE SERVICE, INSTRUCTIONS FOR FORM 5695, at 3 (2018), https://www.irs.gov/pub/irs-pdf/i5695.pdf [https://perma.cc/CME9-NNV6].

24. 26 U.S.C. § 48(a)(6)(A) (2019).

25. *Id*.

26. 26 U.S.C. § 48(a)(2)(A)(ii) (2019).

27. Kristina Caffrey, *The House of the Rising Sun: Homeowners' Associations, Restrictive Covenants, Solar Panels, and the Contract Clause*, 50 NAT. RES. J. 721, 729–30 (2010) (citing Kraye v. Old Orchard Ass'n, No. C 209-453 (Cal. App. Dep't Super. Ct. Feb. 28, 1979), *printed in Recent Decisions*, 1 SOLAR L. REP. 503, 504–06 (original opinion unpublished)).

28. *Common Interest Developments: Solar Energy Systems: Hearing on Assemb. B. 634 Before the Assemb. Comm. on Judiciary*, 2017–18 Assemb., Reg. Sess. 4 (Cal. 2017).

29. CAL. CIV. CODE § 714.1 (West 2019).

30. CAL. CIV. CODE § 4250 (West 2019).

as the separate interest.[31] The condominium owner also owns the exterior of all of the units and the rest of the neighborhood areas, such as green space, driveways, and fitness facilities, in common with the other unit owners, known as common areas.[32]

II. DISCUSSION

The California Solar Rights Act and existing case law recognizes that HOAs do have the ability to impose restrictions on homeowners in the community.[33] However, new provisions applicable to condominium owners remove some of the barriers that condominium associations could impose on homeowners attempting to install solar panels on a common area roof above their individual condominium. The main avenue that HOAs could use to outright challenge the new law would be the Contracts Clause of the United States Constitution, but such a challenge is unlikely to prevail.

A. HOAs can Impose Some Restrictions on Solar Panel Installation

The crux of the Solar Rights Act is that any blanket prohibitions in CC&Rs on installation of solar energy systems within HOA communities are voided.[34] Nevertheless, the installation process for solar panels must comply with state and federal law.[35] If the HOA requires it, a homeowner must apply to the HOA for a solar panel installation, which the HOA will process in the same manner as other architectural review submissions.[36] If the HOA fails to take action on the proposed installation within 45 days, the homeowner's request is deemed to be approved.[37] An HOA can still impose "reasonable restrictions" on homeowners wishing to install solar panels;[38] however, California Civil Code § 714 provides a bright-line rule to determine when a restriction is reasonable. If the restriction imposes a

31. CAL. CIV. CODE § 4185 (West 2019); CAL. CIV. CODE § 4125 (West 2019). *See also* ADAMS STIRLING P.C., EXCLUSIVE USE COMMON AREA, https://www.davis-stirling.com/HOME/Exclusive-Use-Area [https://perma.cc/ZM7L-VHKX] (last visited Sept. 26, 2019).

32. CAL. CIV. CODE § 4095 (West 2019); CAL. CIV. CODE § 4125 (West 2019). *See also* ADAMS STIRLING P.C., *supra* note 31.

33. *See, e.g.*, CAL. CIV. CODE § 714(b) (West 2019).

34. CAL. CIV. CODE § 714(a) (West 2019).

35. CAL. CIV. CODE § 714(c) (West 2019).

36. CAL. CIV. CODE § 714(e)(1) (West 2019).

37. CAL. CIV. CODE § 714(e)(2)(B) (West 2019).

38. CAL. CIV. CODE § 714(b) (West 2019).

burden that increases the cost of the installation by the lesser of 10% or $1,000, or decreases efficiency by 10%, the restriction is statutorily deemed not to be a reasonable restriction.[39] HOAs can impose further restrictions, such as specifying which solar energy systems are approved, requiring the homeowner to be responsible for maintenance, repair, or replacement of the roof, and requiring the installation company to indemnify the HOA from damages caused to the roof during installation.[40] If an HOA fails to comply with the Solar Rights Act, the HOA could be subject to a civil penalty of up to $1,000 in addition to actual damages.[41] The prevailing party would also be awarded attorney's fees.[42]

The California Solar Rights Act's intrusion on contrary restrictive covenants was not developed in a vacuum. There are other analogous circumstances where the California Legislature has imposed limitations on enforcement of restrictive covenants.[43] The areas most similar to solar panel system siting would be the limitations on restrictive covenants that affect satellite dish and television antenna installation, and more recently, electric vehicle charging ports.

The reach of restrictive covenants has been limited on the installation of television antennae or satellite dishes.[44] As long as the homeowner proposes to install a satellite dish that is not visible from a street or common area and is less than 36 inches in diameter, the HOA cannot prohibit or restrict the installation of the antenna or satellite dish.[45] As with the television antenna and satellite dish installations statute, solar panel installation is subject to reasonable restrictions. Those restrictions must not "significantly increase" the cost of installation, though in the case of antenna or satellite dish installation, the term "significantly increase" is not defined.[46] The statute provides four examples of reasonable

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39. CAL. CIV. CODE § 714(d)(1)(A) (West 2019). In a litigated dispute between a homeowner and association regarding whether the association imposed a condition that reduced efficiency by 10%, expert testimony would likely be needed to resolve the question, which would be for the finder of fact to decide. *See, e.g.*, Tesoro de Valle Master Homeowners Ass'n v, Griffin, 133 Cal. Rptr. 3d 167, 184 (Cal. Ct. App. 2011).

40. CAL. CIV. CODE § 714.1 (West 2019).

41. CAL. CIV. CODE § 714(h) (West 2019).

42. CAL. CIV. CODE § 714(g) (West 2019).

43. *Common Interest Developments: Solar Energy Systems: Hearing on Assemb. B. 634 Before the Assemb. Comm. on Judiciary*, 2017–18 Assemb., Reg. Sess. 4 (Cal. 2017).

44. CAL. CIV. CODE § 4725 (West 2019).

45. CAL. CIV. CODE § 4725(a) (West 2019).

46. CAL. CIV. CODE § 4725(b) (West 2019).

restrictions. The first restriction is that the homeowner can be required to submit an application and notice to the HOA.[47] The second restriction is that the HOA can require approval for installation of an antenna or satellite dish installed on another homeowner's separate interest.[48] The third restriction is that the installing homeowner may be responsible for "maintenance, repair, or replacement of roofs or other building components."[49] The fourth and final reasonable restriction is that the homeowner may be required to indemnify or reimburse the HOA for costs incurred for damage caused or maintenance required by the installation of the antenna or satellite dish.[50] The issue of satellite dishes was subject to litigation prior to imposition of the statute. Because the statute was enacted, the language has provided clear rules and has not resulted in any reported decisions.[51]

Another analogous area of limitations on HOA restrictive covenants involves the installation of electric vehicle charging units.[52] The statute provides that any restrictive covenant which "effectively prohibits or unreasonably restricts" the owner's ability to install an electric vehicle charging port is unenforceable.[53] Reasonable restrictions are those that do not "significantly increase the cost" or "significantly decrease . . . efficiency" of the unit, but the terms are not defined.[54] If the installation is in a common area, the owner must apply to the association and the association must approve the installation, if the owner agrees to the requirements of the statute.[55] For instance, the owner must obtain insurance and pay the installation costs and the costs of electricity used by the unit.[56]

Normally, when an owner applies to convert a common area to be exclusively used by that owner, two-thirds of the condominium owners must concur to approve the change.[57] Similar to adding solar panels to a common area, the installation of a charging unit for an electric vehicle in an owner's parking space that has to cross through common areas is not

47. CAL. CIV. CODE § 4725(b)(1) (West 2019).
48. CAL. CIV. CODE § 4725(b)(2) (West 2019).
49. CAL. CIV. CODE § 4725(b)(3) (West 2019).
50. CAL. CIV. CODE § 4725(b)(4) (West 2019).
51. *See* Portola Hills Cmty. Ass'n v. James, 5 Cal. Rptr. 2d 580, 581 (Cal. Ct. App., 1992).
52. CAL. CIV. CODE § 4745 (West 2019).
53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*.
57. CAL. CIV. CODE § 4600(a) (West 2019).

subject to the two-thirds membership approval requirement.[58] This area of litigation has also not resulted in any reported cases.

To date, solar panel installation in HOA communities has not been an area experiencing much litigation.[59] The most recent case was in 2017.[60] However, a combination of forces may result in more litigation activity as more homeowners pursue solar installation. First, the federal tax credits are set to phase out between 2020 and 2022, which may spur installations during the remaining term of the credits.[61] Second, the overall price for solar installation will likely continue to decrease based on economy of scale once the separate 2018 building regulations requiring solar installations for new construction go into effect, which is part of a concentrated effort to expand solar.[62] Third, the price of energy from utilities is set to rise based on new time-of-use peak charges.[63] Fourth, as more homeowners add solar, it could cause a cascade effect if electricity rates increase on the remaining non-solar homeowners by generating greater savings for adding solar energy.[64] Even beyond economic causes, the specter of climate change is making the public more environmentally conscious.[65] If an environmentally-conscious homeowner is looking for a way to mitigate greenhouse gas emissions, installing solar panels will be

58. CAL. CIV. CODE § 4600(b)(3)(H) (West 2019).

59. ANDERS ET AL., *supra* note 16, at 8.

60. Sanctuary Retreat Props., LLC v. Shekhter, 2017 WL 6615814, *1 (Cal. Ct. App., 2017) (voiding a restrictive covenant requiring a 100-foot setback from the property line because the cost of an alternative would be over the $1,000 reasonable expense threshold).

61. 26 U.S.C.A. § 48(a)(6) (West 2019).

62. CAL. CODE REGS. tit. 24, § 6-150.1(c)(14) (2018) (requiring almost all new homes, except high-rise apartments, to come with solar energy systems).

63. Herman K. Trabish, *California Utilities Prep Nation's Biggest Time-of-Use Rate Rollout*, UTILITY DIVE (Dec. 6, 2018), https://www.utilitydive.com/news/california-utilities-prep-nations-biggest-time-of-use-rate-roll-out/543402/ [https://perma.cc/FCC2-9CTW]. *But see*, Jeff St. John, *An Hour's Difference Triggers Pushback over California's Time of Use Rates*, GREEN TECH MEDIA (Aug. 8, 2017), https://www.greentechmedia.com/articles/read/hour-debate-california-time-of-use-rates#gs.CbUVBrIl [https://perma.cc/SRW9-R2XN].

64. GALEN BARBOSE, PUTTING THE POTENTIAL RATE IMPACTS OF DISTRIBUTED SOLAR INTO CONTEXT 13 (2017), http://eta-publications.lbl.gov/sites/default/files/lbnl-1007060.pdf [https://perma.cc/4ANB-BS6K].

65. *See, e.g.*, *Global Consumers Seek Companies that Care about Environmental Issues*, NIELSEN (Sept. 11, 2018), https://www.nielsen.com/eu/en/insights/article/2018/global-consumers-seek-companies-that-care-about-environmental-issues/ [https://perma.cc/P3GS-G2KJ].

a way to accomplish their goal.[66] As a result of a combination of these economic and societal causes, more homeowners may soon be planning to pursue solar panel installation, thus resulting in the likelihood of increased litigation.

1. Palos Verdes Homes Association–*Solar Water Heating System*

The earliest case that would prove instructive on possible reasonable restrictions that HOA communities could impose is *Palos Verdes Homes Ass'n v. Rodman*, which involved an earlier version of California Civil Code § 714.[67] This case deals with differences between active and passive solar water heating systems.[68] In this case, the homeowners installed a passive solar water heating system on their home despite the HOA having denied their application.[69] The HOA denied the request to install the passive solar water heating system for aesthetic reasons, based on the fact that the tank sits above the roof line of the home.[70] The California appellate court upheld the ruling of the lower court in favor of the HOA under California Civil Code § 714 because the evidence presented demonstrated that the active systems permitted by the HOA's guidelines would be comparable to the homeowner's passive system in both "performance and costs."[71]

2. Tesoro del Valle Master Homeowners Association–*Ground-Mounted Solar Panels*

A more recent, prominently cited case that is illustrative on issues surrounding permissible reasonable restrictions on solar panels is *Tesoro del Valle Master Homeowners Association v. Griffin*.[72] In this case, the

66. *See* MASHAIL S. ARIF, RESIDENTIAL SOLAR PANELS AND THEIR IMPACT ON REDUCTION OF CARBON EMISSIONS 11 (2013), https://nature.berkeley.edu/classes/es196/projects/2013final/ArifM_2013.pdf [https://perma.cc/K9X5-HCJ3].

67. 227 Cal. Rptr. 81 (Cal. Ct. App. 1986).

68. In a passive solar water heating system, the water is heated through natural convection through the solar panels. This requires that the water tank be located higher than the solar collection panels. In an active solar water heating system, there is a pump to circulate the water through the solar panels. *See Solar Water Heating*, GREEN RIVERSIDE, https://www.energydepot.com/RPUres/library/Swaterheater.asp [https://perma.cc/L8BF-E5UL] (last visited Sept. 19, 2019).

69. *Palos Verdes Homes Ass'n*, 227 Cal. Rptr. at 82.

70. *Id.* at 82–84.

71. *Id*. at 83–84.

72. 133 Cal. Rptr. 3d 167 (Cal. Ct. App. 2011).

homeowner proposed to build a solar installation on a slope in their yard. There are several reasons why they may have wanted to do this because a ground-mounted solar panel array could provide benefits that rooftop solar arrays cannot. For instance, ground-mounted arrays can be positioned to better capture the angle of the sun than a rooftop system, which is fixed at the angle of the roof.[73] Since most roofs are not designed with solar systems in mind, the angle of the rooftop may not provide an advantageous angle for a solar array to capture the sun's rays.[74] A standard ground-mounted system may also be manually adjusted throughout the year to adjust to the changes in the sun's position in the sky. Some ground-mounted systems also contain tracking mechanisms that allow the system to follow the sun's position throughout the day for ultimate efficiency.[75] While ground-mounted systems can be more expensive to install than rooftop systems, their ability to generate electricity more efficiently can mean greater long-term cost savings than a rooftop system.[76]

The Tesoro del Valle Master HOA required that all projects be approved by the Architectural Control Committee prior to construction.[77] The governing documents also had specific safety requirements that applied to proposed projects on sloped areas.[78] In this case, the Committee denied the homeowner's request for not providing sufficient information on how the slope would be maintained and noted that the roof of an outbuilding would be a suitable alternative site for the solar panel installation.[79] However, rather than working with the Committee, the homeowner proceeded with installing solar panels on the roof of their main home (which was not part of the application) and on the slope.[80] While construction was ongoing, the homeowner submitted a supplemental application at the Committee's request. The Committee approved the installation on the roof but denied the installation on the slope.[81] However,

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73. *Ground Mount Solar Panels: Top Three Things You Need to Know*, ENERGYSAGE, https://news.energysage.com/ground-mounted-solar-panels-top-3-things-you-need-to-know/ [https://perma.cc/K5C3-LXZE] (last visited Sept. 15, 2019).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Tesoro del Valle Master Homeowners Ass'n*, 133 Cal. Rptr. 3d at 170.
78. *Id.* at 171.
79. *Id.* at 171–72.
80. *Id.* at 173.
81. *Id.*

the homeowner continued and completed the installation of solar panels on the slope. The HOA then initiated suit against the homeowner.[82]

The California Court of Appeals upheld the lower court's finding that the HOA's alternative, which was placing solar panels on the roof of the out-building rather than on the slope, was a reasonable requirement under California Civil Code § 714.[83] The HOA's proposed alternative would have yielded the same performance efficiency and would have been less expensive to install.[84] However, it would have yielded 14% less output since it would have been a smaller system.[85] Under this statute, output (the volume of electricity produced, measured in Watts) is not considered when determining whether the restriction is reasonable, only cost and efficiency are the enumerated criteria.[86] Thus, because the HOA's proposed alternative did not create added cost or lower efficiency, the court found the HOA's proposed alternative to be reasonable.[87]

3. Schoff v. Stone*–Homeowner Did Not Seek Approval*

In the 2013 case of *Schoff v. Stone*, the homeowners contended that any restriction on the installation of solar panels on their roof was voided by the Solar Rights Act.[88] However, the trial court followed the provisions of California Civil Code § 714 regarding CC&R provisions, holding that certain reasonable restrictions were permissible.[89] The installation of solar panels on the roof of a duplex condominium required the approval of the owner of the adjacent unit, per the CC&Rs, as it was an exterior modification.[90] Because the homeowners did not seek approval of the owner of other unit, the homeowners' solar installation and other modifications were impermissible.

4. Sanctuary Retreat Properties*–Ground-Mounted Solar Array Near Property Line*

Most recently, in 2017, an appeals court in California refused to enforce a restrictive covenant between two adjoining landowners in a

82. *Id.*
83. *Id.* at 177–79.
84. *Id.* at 178.
85. *Id.*
86. CAL. CIV. CODE § 714(b) (West 2019).
87. *Tesoro del Valle Master Homeowners Ass'n*, 133 Cal. Rptr. 3d at 177–78.
88. 2013 WL 3368364, *7–*8 (Cal. Super. Ct. L.A. Co., 2013).
89. *Id.*
90. *Id.*

common interest development that prohibited installation of a solar array within 100 feet of the property line.[91] In this case, the HOA had approved the installation of the solar array, but there was a separate restrictive covenant in place between the two adjoining parcels that controlled.[92] The restrictive covenant was made between prior owners of the parcels.[93] To satisfy the requirements of the restrictive covenant an additional $25,000 would have been added to the cost of the solar array.[94] While the trial court erroneously held that the solar array was not an "improvement" and that the restrictive covenant did not apply, it also found in the alternative that if the restrictive covenant applied, it would be voided by the provisions of the Solar Rights Act as an unreasonable restriction.[95] The appellate court overruled the trial court's reasoning, but upheld the judgment in favor of the homeowner who constructed the solar panels, based on the unreasonable cost of compliance.[96]

An HOA can require approval prior to installation of solar panels and can impose reasonable restrictions on the homeowner. In the cases where the HOA has prevailed, it has been because the restrictions imposed were reasonable within the dictates of the statute, the HOA had provided reasonable alternatives, and the homeowner disregarded the HOA. The statute provides a bright-line test to determine reasonableness based on whether the HOA's restrictions increased the homeowner's costs by 10% up to $1,000 or reduced efficiency by 10%.[97] For the condominium association to prevail, it must show that the restrictions meet the test of the statute or otherwise show that the homeowner has failed to comply with applicable requirements.

B. New Rights for Owners in Condominium Communities

The new amendments to the Solar Rights Act have the effect of giving more power to homeowners in condominium communities who wish to install rooftop solar panels on their building, while at the same time, balancing the interests of other members of the condominium. Where homeowners in condominium communities were often prevented from

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91. Sanctuary Retreat Props., LLC v. Shekhter, 2017 WL 6615814, *1 (Cal. Ct. App., 2017).
92. *Id.* at *2–*3.
93. *Id*. at *1.
94. *Id.* at *4.
95. *Id.*
96. *Id.* at *9–*10.
97. CAL. CIV. CODE § 714.1(d)(1)(B) (West 2019).

installing solar panels, the law now provides a feasible path for them to do so.[98]

First, an association cannot "[e]stablish a general policy prohibiting the installation or use of a rooftop solar energy system for household purposes on the roof of the building in which the owner resides, or a garage or carport adjacent to the building that has been assigned to the owner . . . ."[99] Second, an HOA cannot mandate "approval by a vote of members" of the association "for installation of a solar energy system for household purposes on the roof of the building in which the owner resides, or a garage or carport adjacent to the building that has been assigned to the owner . . . ."[100]

In condominium communities, if a member is attempting to obtain exclusive use over an area that is common property, California condominium law requires that two-thirds of the members must approve the exclusive use.[101] To resolve any conflict between the amended Solar Rights Act and the condominium statute, the legislature amended the California condominium association statute to provide that a two-thirds vote of the members of the association is not required when a member proposes "[t]o install and use a solar energy system on the common area roof of a residence . . . ."[102] This amendment was a provision advocated for by homeowners within a condominium association that required a two-thirds vote, which the homeowners were not able to surmount due to a high proportion of non-voting members.[103] Additionally, attempting to achieve an affirmative vote result can cost the homeowner an additional thousands of dollars in studies and promotional materials.[104] The provision was specifically crafted to prevent homeowners associations from being able to prevent installation of rooftop solar through the two-thirds vote mechanism.[105]

While the old law seeks to encourage condominium owners to install rooftop solar panels, the new law does include some provisions to protect other owners within the condominium association. First, if a homeowner proposes to install a solar panel on a common roof shared by multiple

98. Assemb. B. 634, 2017–18 Leg., Reg. Sess. (Cal. 2017) (Concurrence in Senate Amendments).

99. CAL. CIV. CODE § 714.1(b)(1) (West 2019).

100. CAL. CIV. CODE § 714.1(b)(2) (West 2019).

101. CAL. CIV. CODE § 4600(a) (West 2019).

102. CAL. CIV. CODE § 4600(b)(3)(J) (West 2019).

103. Assemb. B. 634, 2017–18 Leg., Reg. Sess. (Cal. 2017) (Concurrence in Senate Amendments).

104. S. Judiciary Comm., Report on AB 634 (Eggman), S. 2017-AB634, Reg. Sess., at 2 (Cal. 2017).

105. *Id.*

units, the homeowner must notify each owner of a unit within that building.[106] Second, the owner must maintain a "homeowner liability coverage policy at all times" and provide a copy of the policy certificate to the association on an annual basis.[107] This requirement solves the problem of potential damage to the roof or leaking that could potentially be caused by the solar array.[108] The liability insurance requirement also was an important risk-balancing provision favored by HOAs to prevent litigation between homeowners over damages to the roof caused by solar array installation.[109]

While these first two provisions are mandatory, there are discretionary restrictions that a condominium association may employ for solar installations on a common rooftop. First, an association may require the homeowner to submit a solar site survey prepared by a licensed contractor.[110] The solar site survey would determine an equitable allocation of the usable solar roof area among all of the owners sharing the common roof.[111] The association can also require the homeowner to be responsible for the costs of damages resulting from the installation, upkeep, and removal of the solar array, as well as the maintenance responsibility for the solar array.[112] Successive owners could also be bound to these requirements.[113] Finally, an association can require the owner to disclose the solar array and accompanying responsibilities to prospective purchasers of the owner's condominium unit.[114]

C. The California Solar Rights Act Can Withstand Scrutiny

Some commentators raise the potential issue that HOAs could challenge statutes such as California's Solar Rights Act as impinging on the Contracts Clauses of the U.S. Constitution and California's state constitution.[115] However, while this may be an issue for statutes in other

106. CAL. CIV. CODE § 4746(a)(1) (West 2019).
107. CAL. CIV. CODE § 4746(a)(2) (West 2019).
108. S. Rules Comm., Floor Analysis for Third Reading of AB 634, S. 2017-AB634, Reg. Sess., at 3–4 (Cal. 2017).
109. S. Judiciary Comm., Report on AB 634 (Eggman), S. 2017-AB634, Reg. Sess., at 7 (Cal. 2017).
110. CAL. CIV. CODE § 4746(b)(1) (West 2019).
111. *Id.*
112. CAL. CIV. CODE § 4746(b)(2) (West 2019).
113. *Id.*
114. CAL. CIV. CODE § 4746(b)(3) (West 2019).
115. Evan J. Rosenthal, *Letting the Sunshine In: Protecting Residential Access to Solar Energy in Common Interest Developments*, 40 FLA. ST. U. L. REV. 995,

states, this angle of attack is unlikely to prove fruitful for HOAs attempting to strike down the California law.[116] The Contracts Clause of the United States Constitution provides that, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[117] California's state Constitution has a similar provision that directs "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed."[118] The analysis is identical for both the U.S. Constitution and California Constitutional clauses.[119]

The holding of *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* provides that a state may pass a law that substantially infringes on a contractual relationship and obligations as long as there is a significant, legitimate state interest.[120] The *Energy Reserves Group* case provided a three-step test to determine cases under the Contract Clause. First, the court looks at whether the state law substantially impairs the contractual obligations.[121] Second, if the court finds that the contractual obligations have been significantly impaired, the court looks at whether the state has a "significant and legitimate public purpose."[122] Finally, if the state has met the significant, legitimate state interest requirement, then the court will evaluate whether the contractual impairment is "based on reasonable conditions" and is "appropriate" to the identified state interest.[123]

1. The Solar Rights Act Does Not Create Substantial Interference with Contracts

California's Solar Rights Act, including the amendment extending to condominiums, would likely withstand scrutiny under the Contracts

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1006 (2013); Eric Glazer & Louis Goetz, *Florida Community Association Law: Contracts Clause Application in an Ever-Changing Legislative Landscape*, 89 FLA. BAR. J. 46 (2015) (discussing parallel issue in Florida); Caffrey, *supra* note 27, at 740–41. *See also* Kylee Gloeckner, *Nevada's Foreclosure Epidemic: Homeowners Associations' Super-priority Liens Not So "Super" for Some*, 15 NEV. L.J. 326, 352 (2014) (discussing how Nevada statute that prioritizes HOA lien over first mortgage lien on property is potentially unconstitutional under Contracts Clause).

116. *See* Caffrey, *supra* note 27, at 740–41.

117. U.S. CONST. art. I, § 10, cl. 1.

118. CAL. CONST. art I, § 9.

119. Barrett v. Dawson, 71 Cal. Rptr. 2d 899, 903 (Cal. Ct. App. 1998).

120. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 416 (1983).

121. *Id.* at 411.

122. *Id.*

123. *Id.* at 412.

Clause. The law clearly impairs the obligations of a homeowner and condominium association specified in the CC&Rs. It places restrictions on the freedom of HOAs to carte blanche regulate solar installations by homeowners. However, there is a strong argument that the impairment of contractual obligations is not substantial.[124] In *Sveen v. Melin*, the U.S. Supreme Court succinctly defined this as "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."[125] Under *Energy Reserves Group*, the Court noted that "whether the industry the complaining party has entered has been regulated in the past" is a consideration to determine substantial impairment.[126] The case focused on the fact that the energy industry is a regulated environment; thus, the energy company (a natural gas supplier) could expect interference from the state government.[127] Similarly, the California case *Hellinger v. Farmers Group, Inc.* held that a law that permitted time-barred earthquake insurance claims, creating an impairment on insurance contracts, was "relatively moderate and restrained" because of the "extensive regulation of the insurance industry."[128] Even a ban on oil drilling enacted by the City of Hermosa Beach was not held to substantially interfere with a lease the City had with an oil exploration entity for public property because of past regulations of the oil industry, among other factors.[129]

In *Hall v. Butte Home Health, Inc.*, a California court analyzing the Contracts Clause issue held that a California fair housing law that prevents discrimination against disabled persons was not a substantial impairment where it overrode a restrictive covenant.[130] In this case, an owner operated a group home for up to six elderly disabled persons out of the home, in contravention to a restrictive covenant that permitted only single-family use of the home.[131] In reaching the determination that the impairment was not substantial, the court focused on the fact that the "character and

124. Caffrey, *supra* note 27, at 754–55.
125. Sveen v. Melin, 138 S. Ct. 1815, 1822 (2018).
126. *Energy Reserves Grp.*, 459 U.S. at 411.
127. *Id.*
128. 111 Cal. Rptr. 2d 268, 282 (Cal. Ct. App. 2001). *See also* Campanelli v. Allstate Life Ins. Co., 322 F.3d 1086 (9th Cir. 2003).
129. Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach, 103 Cal. Rptr. 2d 447, 463 (Cal. Ct. App. 2001) (noting that the court also considered the fact that the lease had a clause anticipating future regulation and the lessee could have, but did not negotiate further development rights or a Development Plan with the City).
130. 70 Cal. Rptr. 2d 246, 254–55 (Cal. Ct. App. 1997).
131. *Id.* at 313.

intensity" of the use of the group home was no greater than single-family homes in the community.[132]

California's Solar Rights Act involves two areas that states have traditionally regulated, which are energy and land use.[133] The Solar Rights Act itself has been around in California since 1978.[134] Regulation of HOAs has also been around since 1985 with the passage of the Davis-Sterling Act.[135] The provisions of the Solar Rights Act are in line with other statutory restrictions on HOAs, such as with installation of satellite dishes.[136] The 2018 amendment, which expands restrictions already in place on HOAs and applies them in the condominium context, would clearly fit in what the *Energy Reserves Group* Court has considered to not be substantial interference with the condominium owner and condominium association relationship.[137] This provides a strong case that the impairment that the Solar Rights Act places on restrictive covenants in condominium communities does not rise to the level of constituting a substantial impairment. Additionally, consistent with the approach of *Hall v. Butte Home Health*, adding solar panels to the roof of a home does not change the character and use of the home or the neighborhood.[138] While adding solar panels to a home does change the exterior appearance of the home, the *Hall* case focused on activities such as commercial use of a home or the homeowner erecting signs or billboards announcing the presence of a group home as altering the character and use of a single-family home.[139] Since solar panels do not convert the character and use of a residence into something different, they are consistent with the existing character and use of the home or neighborhood. Under this approach, that would mean that any impairment created by the new provisions of the Solar Rights Act is not substantial.

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132. *Id.* at 321.

133. *See also* Caffrey, *supra* note 27, at 755.

134. ANDERS ET AL., *supra* note 16, at 2–3.

135. *What You Need to Know: The New Davis-Stirling Act*, EDUC. COMMUNITY FOR HOA HOMEOWNERS, https://www.echo-ca.org/article/what-you-need-know-new-davis-stirling-act [https://perma.cc/LCD3-DTFM] (last visited Sept. 15, 2019).

136. CAL. CIV. CODE § 4725 (West 2014).

137. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983); Cal. Assemb. B. 634 (2017) (codified at Cal. Civ. Code § 714.1 (2019)).

138. 70 Cal. Rptr. 2d 246, 254–55 (Cal. Ct. App. 1997).

139. *Id*.

2. The Solar Rights Act Provisions Advance a Significant, Legitimate State Interest

Notwithstanding the argument on the first prong of the *Energy Reserves Group* test, if the Solar Rights Act's new provisions are held to substantially impair contractual obligations, then the burden shifts to the state to show that the "state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate state interest.'"[140] The *Energy Reserves Group* case defined a significant, legitimate state interest as "the remedying of a broad and general social or economic problem."[141] A legitimate state interest is "not for the mere advantage of particular individuals but for the protection of a basic interest of society."[142] The case held that protecting consumers "from the escalation of natural gas prices caused by deregulation" was a significant, legitimate state interest.[143] In the HOA realm, where a California statute voided a restrictive covenant that prohibited a home daycare as a business use, a California appeals court held that "ensuring adequate and local daycare for working parents" was a significant, legitimate state interest.[144]

California has numerous arguments to show that the impairment of obligations in the CC&Rs serves a significant, legitimate state interest. First, California has been a leader in green energy innovation, encouraging the use of solar power since the 1970s.[145] Second, climate change necessitates a reduction of greenhouse gas emissions, and the proliferation of rooftop solar energy systems will reduce the need for fossil fuel-fired power generation and reduce pollution.[146] The state has established a renewable energy portfolio standard and an increase in rooftop solar will help the state to meet the standard.[147] However, there are also non-environmental state interests that California can assert. The use of

140. Sveen v. Melin, 138 S. Ct. 1815, 1822 (2018) (citing *Energy Reserves Group*, 459 U.S. at 411–12).

141. *Energy Reserves Group*, 459 U.S. at 412.

142. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 445 (1934).

143. *Energy Reserves Group*, 459 U.S. at 417.

144. Barrett v. Dawnson, 71 Cal. Rptr. 2d 899, 903 (1998).

145. Caffrey, *supra* note 27, at 729–30 (citing Kraye v. Old Orchard Ass'n, Superior Court, Los Angeles County No. C 209-453 (Feb. 28, 1979), *printed in Recent Decisions*, 1 SOLAR L. REP. 503, 504–06 (original opinion unpublished)).

146. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT ON RENEWABLE ENERGY SOURCES AND CLIMATE CHANGE MITIGATION: SUMMARY FOR POLICYMAKERS 3 (2011), https://www.uncclearn.org/sites/default/files/inventory/ipcc15.pdf [https://perma.cc/3L7K-62U4].

147. CAL. ENERGY COMM'N, *supra* note 14, at 1.

renewable energy, such as rooftop solar panels, to meet household energy needs will reduce energy dependence on importation of foreign fossil fuels.[148] Solar panels also reduce a consumer's monthly energy expenses, which may also provide a state interest in ensuring consumer savings, along the lines of the *Energy Reserves Group* rationale.[149] While utilities warn that increasing proliferation of rooftop solar will cause energy rates to rise, the penetration level of solar in California is currently at such a low level that there is not much impact on rates.[150] The specter of climate change absolutely constitutes a "broad and general social or economic problem," which this legislation seeks to remedy by encouraging renewable, non-fossil fuel sources of electricity.[151] Additionally, the cost that consumers pay for energy has also been upheld as a significant, legitimate state interest.[152]

The portion of the legislation that amends the threshold for approving the installation of a solar rooftop system within a common area would clearly be upheld as furthering a significant, legitimate state interest.[153] Prior legislation that permitted a simple majority vote of homeowners to be sufficient has been upheld as protecting a significant, legitimate state interest.[154] Case law has provided that there is significant, legitimate state interest in providing the HOA with a "safety valve" to make changes "where the need for a supermajority vote would hamstring the association."[155] This same rationale upholds the significant, legitimate state interest in adding solar installations to that list.

While California would have an easier time in proving a significant, legitimate state interest because of its long history of promoting green energy and its status as a leader on climate change, neighboring states would also be able to show a significant, legitimate state interest when considering to enact similar legislation.[156] Even if those states have been slow to react to climate change or are only more recent promoters of renewable energy, all states can likely meet the burden of showing how

148. Caffrey, *supra* note 27, at 751.
149. PECHMAN, *supra* note 20.
150. BARBOSE, *supra* note 64.
151. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 445 (1934).
152. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 417 (1983).
153. CAL. CIV. CODE § 4600(a) (West 2019).
154. Fourth La Costa Condominium Owners Ass'n v. Seith, 71 Cal. Rptr. 3d 299, 317 (Cal. Ct. App. 2008).
155. *Id*. (quoting Blue Lagoon Cmty. Ass'n v. Mitchell, 64 Cal. Rptr. 2d 81, 84 (Cal. Ct. App. 1997)).
156. Caffrey, *supra* note 27, at 751.

encouraging rooftop solar installations within HOA communities remedies broad social or economic problems.[157] Additionally, the economic incentives provided by solar energy for broader energy independence and individual consumer energy bill savings would clearly constitute significant, legitimate state interests.[158]

3. The Solar Rights Act is Reasonable and Appropriate to Further its Purpose

The California law provides an exemplary model of specifying what constitutes reasonable restrictions on HOAs, and as a result, its impairment of an HOA's architectural review process would be seen as reasonable under the Contracts Clause.[159] Once the state has made a showing of a significant, legitimate state interest, the analysis turns to whether the restrictions imposed by the statute are "reasonable" and "appropriate to the public purpose justifying the legislation's adoption."[160] However, this is a deferential standard, where the Court accepts the legislature's "judgement as to the necessity and reasonableness of a particular measure."[161] In this case, the amendments still fit the original purpose of the Solar Rights Act and are merely expanding the opportunity of homeowners to avail themselves of its benefits. This is a case where a court would accept the judgment of the legislature and find the statute to be reasonable and appropriate.

D. The Solar Rights Act as a Model for Other States

Homeowners and condominium associations face significantly less litigation uncertainty in California than they do under solar siting laws passed by other states. For example, neighboring Arizona, which is a sunnier state than California, has a solar statute limiting HOA regulation over siting of solar panels by homeowners.[162] The Arizona statute provides that "an association shall not prohibit the installation or use of a solar energy device . . . ."[163] However, the statute also permits an HOA to "adopt

157. *Id*.
158. *Id*.
159. *Id*. at 740.
160. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 (1983).
161. *Id*. at 413 (providing that heightened scrutiny is applied only when the government is a party to the affected contract).
162. ARIZ. REV. STAT. ANN. § 33–1816 (2019).
163. *Id*.

reasonable rules regarding the placement of a solar energy device if those rules do not prohibit the installation, impair the functioning of the device or restrict its use or adversely affect the cost or efficiency of the device."[164] The problem is that the Arizona statute provides no bright-line rule on what constitutes a reasonable rule or what adversely affects the cost or efficiency of the device.[165] As a result, court decisions are needed to interpret the statute because the statute's lack of specificity creates uncertainty.[166]

Neighboring Oregon takes a different approach than both California and Arizona. Oregon has a solar rights statute that provides that the installation of a solar energy system in a residential zone is "an outright permitted use," and requires local government approval of a permit as long as the solar energy system does not require expansion of the structure and is parallel to the plane of the roof.[167] However, the law is silent as to whether it overrides conflicting CC&Rs imposed by HOAs.[168] One commentator sees the Oregon law as overreaching under the Contracts Clause if the local government approval is seen to supersede the CC&Rs because it would superimpose state law on the subject of solar energy siting despite any contrary agreement between the homeowner and the HOA.[169] However, an argument could also be made that the Oregon law is ambiguous or does not apply to HOAs at all since it does not explicitly speak to CC&Rs as the California statute does.[170]

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164. *Id*.

165. Rosenthal, *supra* note 115, at 1019; Alyssa McCutcheon, *Should the Great Sunshine State of Arizona Do More to Protect Solar Rights?*, 4 ARIZ. J. ENVTL. L. & POL'Y 1027, 1030–31 (2014) ("Without a precise meaning, environmentally minded homeowners will spend unnecessary time and money on litigation against HOAs. Specific limitations on HOA restrictions would be beneficial to Arizona because they would not only help predictability, but they would ensure correct enforcement of the restrictions.").

166. *See, e.g.*, Fox Creek Cmty. Ass'n v. Carson, No. 1 CA–CV 11–0676, 2012 WL 2793206 (Ariz. Ct. App. July 10, 2012).

167. OR. REV. STAT. ANN. § 227.505 (West 2019).

168. Rosenthal, *supra* note 115, at 1010.

169. *Id*.

170. *See, e.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (holding that expression of one point in a statute suggests exclusion of others); U.S. v. Smith, 499 U.S. 160, 166–67 (1991) (holding that a reader should not create an exception where none is specified); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 46–66 (1989) (holding that a reader should avoid an interpretation that would create a constitutional issue). *See also* RUSSELL E. CAPARELLI, THE RHENQUIST'S COURT'S CANONS OF STATUTORY CONSTRUCTION 2–6 (2005), http://www.ncsl

Ultimately, the California Solar Rights Act can withstand constitutional scrutiny should it face such a challenge. It meets the three-part test of *Energy Reserves Group* holding. Because of the prior history of the Solar Rights Act and other limitations on the authority of HOAs, a reviewing court should hold that the new amendments do not create a substantial infringement on the contractual relationship between a condominium owner and condominium association. If an HOA is able to show that the law substantially impairs the homeowner's obligation, the state is able to easily prove a significant state interest and the reasonableness of the restrictions. If other states face challenges under this line of attack, they should look to borrow the framework that California's statute imposes to withstand scrutiny.

E. Best Practices for Avoiding Litigation Risk

Of course, the California statute will not eliminate conflict. The main benefit of the statute is that it provides the factfinder with a far clearer rule to decide a case based on what credible expert testimony shows the cost or efficiency differences to be between the homeowner's proposal and the HOA's alternative.[171] Despite the bright-line rule, there are steps that homeowners and HOAs need to take under the statute to minimize potential conflict. From the homeowner's perspective, the key is to understand that they need to follow any requirements of the HOA to submit their proposed solar energy system plans for approval prior to beginning construction.[172] The homeowner also needs to be aware that the HOA can require modification of the solar energy system up to the limits specified in the statute.[173] Had the homeowners in the *Palos Verdes Homes Association*, *Tesoro del Valle Master Homeowners' Association*, and *Schoff* cases followed the requirements of their HOA governing documents, those cases would have likely resulted in the homeowner being able to install a solar energy system without the litigation costs incurred.[174]

.org/documents/lsss/2013pds/rehnquist_court_canons_citations.pdf [https://perma.cc/K3VY-DCYB].

171. *See, e.g.*, Tesoro del Valle Master Homeowners Ass'n v. Griffin, 133 Cal. Rptr. 3d 167, 170–71 (2011).

172. CAL. CIV. CODE § 714 (West 2019). For an example of an HOA's solar energy regulations, *see, e.g.*, TERRACE AT CANYON HILLS HOMEOWNERS ASS'N, SOLAR ENERGY SYSTEM RULES (2019). The Terrace at Canyon Hills is a townhouse-style condominium association in Laguna Beach, California.

173. CAL. CIV. CODE § 714 (West 2019).

174. Palos Verdes Homes Ass'n v. Rodman, 227 Cal. Rptr. 81, 83–84 (Cal. Ct. App. 1986); Tesoro del Valle Master Homeowners' Ass'n v. Griffin, 133 Cal.

The homeowner also needs to be prepared for the maintenance and insurance requirements that come with the solar energy system.

Where the solar panels are sited on a common roof, the HOA will still need to be able to access the roof. If the HOA has undertaken a roof replacement of the common roof, then the homeowner is responsible for the cost of removing their solar panels so that the HOA's contractors can access the roof to perform the replacement.[175] The homeowner is then responsible for the cost of re-installing the solar panels.[176] Understanding these continuing obligations will avoid later conflicts with the HOA.

By the same token, HOAs need to understand their role in the approval process and the narrow lanes that the legislature has created for HOAs to restrict solar energy systems, even in common areas. The HOA is not likely to be able to outright deny a homeowner's application.[177] Because the statute provides a bright-line rule, an HOA will need to ensure that any modifications it requires to the homeowner's proposal fall within the $1,000 cost increase limitation and 10% efficiency decrease limitation or are tied to a permissible exception in the statute.[178] To promote the equitable allocation of common roof space, a townhome condominium community may require that solar energy siting may only occur on the roof space above the homeowner's unit.[179] The association should impose insurance and maintenance obligations on the homeowner with the solar energy system to the fullest extent under the law.[180] To ensure that homeowners and HOA management understand their obligations and expectations, the best practice is for the HOA to promulgate a solar energy policy.[181]

Rptr. 3d 167, 173 (2011).; Schoff v. Stone, 2013 WL 3368364, at *8 (Cal. Super. June 11, 2013).

175. CAL. CIV. CODE § 714.1 (West, 2019). *See, e.g.*, TERRACE AT CANYON HILLS HOMEOWNERS ASS'N, *supra* note 172, at 5.

176. CAL. CIV. CODE § 4746 (West, 2019). *See, e.g.*, TERRACE AT CANYON HILLS HOMEOWNERS ASS'N, *supra* note 172, at 5.

177. *Id*.

178. CAL. CIV. CODE § 714 (West, 2019).

179. CAL. CIV. CODE § 4746 (West 2019). *See, e.g.*, TERRACE AT CANYON HILLS HOMEOWNERS ASS'N, *supra* note 172, at 1.

180. CAL. CIV. CODE § 4746 (West, 2019). *See, e.g.*, TERRACE AT CANYON HILLS HOMEOWNERS ASS'N, *supra* note 172, at 4–6.

181. *See, e.g.*, TERRACE AT CANYON HILLS HOMEOWNERS ASS'N, *supra* note 172.

CONCLUSION

California's Solar Rights Act, and particularly the new amendments that extend to condominium communities, form a model for other states looking to encourage residential solar self-generation. The statute provides clear, reasonable requirements for both homeowners and associations and balances the interests of each party. While condominium associations will undoubtedly test the limits of the statute, they will only prevail in situations where the restrictions imposed are reasonable or the homeowner has otherwise disregarded the association's approval process. Condominium associations may attempt constitutional challenges to the law under the Contracts Clause. However, because the state of California has a significant, legitimate interest in promoting the use of renewable energy and the law imposes reasonable conditions to meet this end, it would survive challenge under this argument.

The statute and case law provide several important points for homeowners and HOAs to keep in mind. Homeowners need to ensure that they still follow the requirements of the HOA to submit plans for review and that they can undertake the insurance and maintenance obligations that come with the solar energy system. HOAs should work with homeowners to appropriately modify their proposals, bearing in mind the limitations under the statute. Following these best practices will enable homeowners to take advantage of the new authority provided in the statute while minimizing conflicts.